THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEAN WARNER, et al.,

Grievants,

v. **Docket No. 2020-0434-CONS**

TAX DEPARTMENT,

Respondent.

DECISION

Grievants, Jean Warner, Janice L. Blackburn, Kimberly Wolfe, Lynne Marie Love, and Anthony "Tony" Bell, filed identical, separate grievances all dated October 1, 2019, and Grievant Patricia Lemmon filed an identical level one grievance dated November 1, 2019, against their employer, Respondent, Tax Department, stating as follows: [1]

> [t]his grievance is regarding the Auditing Division policy for flex time for Tax and Revenue Auditor 1, 2, and 3 whose official workstation is their home. The policy went into effect on 9/30/2019. The policy, which removed the right to flex from all Auditing Division employees who work from home, is discriminatory in that it no longer affords these employees the same benefits as those auditors who are in the same job classifications. WV Code 29-6A-2(d) defines discrimination as: "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." The Division of Personnel has three job classifications for Tax and Revenue Auditors; (sic) Auditor 1, Auditor 2, and Auditor 3. There is no distinction between those who work at state owned buildings, or those who work from home, we are all similarly situated. Auditors, as well as all other tax department employees who work in state owned buildings and supervisors whose official work station is their home, are still allowed to flex. For example, they can have a doctor appointment in the morning and miss three hours of work. They can then "flex" to make up the missed work hours

[1]The original grievances were assigned the following Docket Numbers: Warner, 2020-0429-DOR; Blackburn, 2020-0430-DOR; Wolfe, 2020-0431-DOR; Love, 2020-0432-DOR; Bell, 2020-0433-DOR; and, Lemmon, 2020-0538-DOR.

> without charging time to their sick or annual leave balances. This ability to allow other auditors who are similarly situated to flex, has nothing to do with job responsibilities, and is discriminatory. Other tax division employees flex for an entire day and at the end of their day. While the flex time policy was in effect, the auditors who work outside of a state-owned facility were forced to email at the start of their day and at the end of their day. No other tax division employees, including auditors who did not flex, were forced to do so, this is also discriminatory. If an auditor worked outside a state-owned facility, flexed, then forgot to send the email, they were forced to take annual leave.[2]

As the relief sought, Grievants seek the following:

> The auditors filing this grievance want the flex policy back into effect for all auditors who work outside a state-owned building or were previously approved for flex time. We want the same flex hours that we had previously.
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> Once the policy is reinstated, we should not be required to email at the start and end of the day unless ALL auditors are required to do so.
>
> We want any leave that we have been forced to charge reinstated in full, due to the inability to not flex our work hours.

These separate grievances were consolidated at level one of the grievance procedure, and assigned Docket Number 2020-0434-CONS.

A level one hearing was conducted on December 5, 2019, and was granted in part and denied in part by decision dated January 27, 2019.[3] Grievants appealed to level two

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[2]While Grievants have used the word "flex" in their statement of grievance and at the level three hearing, it appears that they actually mean "Alternative Work Schedule," or "AWS." The focus of their argument is that they had been allowed to work four days per week, ten hours per day, the ability to do so was taken from them, and they want it restored. Grievants did not raise a specific complaint about the use of flextime in their statement of grievance or at level three. Therefore, flextime will not be further addressed herein.

[3]In its decision, the Level I Grievance Evaluator found that "[c]ancelling AWS only for field auditors when production numbers for the entire unit is down is discriminatory. However, AWS is a discretionary policy. Therefore, Grievants must show that the cancellation of AWS was clearly wrong, inappropriate or the result of an abuse of discretion. This burden

on February 6, 2020. A level two mediation was conducted via Zoom video conferencing on December 17, 2020.[4] Grievants perfected their appeal to level three on January 4, 2021. The level three hearing was conducted on April 22, 2021, via Zoom video conferencing before the undersigned administrative law judge who appeared from the Grievance Board's Charleston, West Virginia, office. Grievants Warner, Blackburn, Wolfe, Love, and Lemmon appeared *pro se* by video conferencing from different locations. Grievant Anthony "Tony" Bell did not appear as he was serving in the National Guard. Grievant Warner, the spokesperson for the Grievants, informed this ALJ that she had authority from Mr. Bell to proceed in his absence. Respondent appeared by counsel, Andrew L. Ellison, Esquire, Assistant Attorney General. Harry Yates appeared as Respondent's personal representative. Respondent now appears by substituted counsel, Cassandra L. Means, Esquire, Assistant Attorney General. This matter became mature for decision on August 17, 2021, upon receipt of the Respondent's proposed Findings of

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was not met. A supervisor has discretion in authorizing flex time. Since flextime is discretionary, a grievant must show the decision was clearly wrong, inappropriate, or the result of an abuse of discretion. That burden has not been met. The requirement of sending an email at the beginning and close of a day is within the authority and discretion of management. However, having leave time taken away for not emailing when the auditor is a his or her post is punitive. The Respondent did not show that the action taken, forcing leave to be taken after one "free pass," was justified. There was not showing that the auditor was not at his or her workplace. There was no showing of progressive discipline. Any grievant claiming to have had to use leave time based on not emailing when the grievant was working, must document the time and day the leave was lost within thirty days of receipt of this decision. Respondent must restore the time lost." *See*, level one decision, pg. 10.

[4]In March 2020, in-person operations of the Grievance Board, as well as all other government offices, were halted as a result of the COVID-19 pandemic. Therefore, the level two mediation was delayed.

Fact and Conclusions of Law.[5] Grievants did not avail themselves of the opportunity to submit proposals.

Synopsis

Grievants are employed by Respondent as Auditor 3 field auditors. Grievants requested and were granted the opportunity to work alternative work schedules (AWS) pursuant to policy in 2018. While working AWS, Grievants worked four days per week, ten hours per day. About one year later, Respondent terminated Grievants' AWS and returned them to a traditional work week schedule, citing decreased production. Respondent also terminated Grievants' ability to apply for AWS in the future but did not prohibit the office-based auditors from the doing so. Grievants allege discrimination. Respondent denies Grievants' claims and asserts that it had the authority to terminate their AWS and prohibit them from working AWS in the future given the responsibilities of

[5]At the conclusion of the level three hearing, this ALJ set the mailing date for the parties' proposed post-hearing submissions as May 28, 2021, based upon the agreement of the parties. By email dated May 25, 2021, Respondent asked for a sixty-day extension of the deadline for the submission of these proposals because of the illness of its counsel. Grievants were copied on this email. Grievant responded that they had no objection to Respondent's request for extension. For good cause shown, this ALJ granted Respondent's request and set the new deadline for the submission of the parties' proposals as July 27, 2021.

By email dated July, 22, 2021, Respondent asked for a second of extension of the deadline for submission of post-hearing proposals due to the illness of its counsel. In its email, Respondent asked that the deadline be moved to August 13, 2021, and stated that it had conferred with the Grievants and they had no objection to their request. Grievants were copied on this email and they did not raise any objection to the request. For good cause shown, this ALJ set the new deadline for the submission of the parties' proposals as August 13, 2021.

Respondent's proposals were received on August 17, 2021, and were postmarked August 13, 2021. The Grievance Board received no proposals from the Grievants.

their positions. Grievants failed to prove their claim by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are employed by Respondent in its Auditing Division as Tax and Revenue Auditor 3s. Grievant Warner has been employed by Respondent for approximately fifteen years. Grievant Wolfe has been employed by Respondent for approximately twenty-six years. The tenure of the other Grievants was not discussed at the level three hearing.

2. Dana Angell is the Director of the Auditing Division of the Tax Department. Director Angell has been employed by Respondent for thirty-three years. Danny Morgan is the Assistant Commissioner of Operations. Assistant Commissioner Morgan has been employed by the Tax Department since 2014.

3. Pursuant to its classification specification, a Tax and Revenue Auditor 3, such as Grievants, "under limited supervision, performs advanced level tax field auditing involving the onsite examination of highly complex accounting systems, accounts, journals, payroll records, invoices, inventories and budget financial records of businesses, corporate accounts and local government entities to determine proper reporting and payment of taxes and compliance with federal, state and local rules and regulations. Contacts with attorneys, accountants, business owners, and government officials are

extensive. Considerable in-state and out-of-state travel is involved. Acts as lead worker and trains lower level employees. Performs related work as required."[6]

4. The Auditing Division employs between thirty-five and forty auditors. Auditors hold the following classifications: Tax and Revenue Auditor 1, Tax and Revenue Auditor 2, and Tax and Revenue Auditor 3. These classifications are designated as either office-based auditors, also called desk auditors, or field auditors. As of the time of the level three hearing, Respondent employed about thirty field auditors and about ten office-based auditors.

5. Grievants are designated as field auditors. Their official workstations are their homes in the various parts of the state. As field auditors, Grievants travel from their homes to taxpayer businesses to conduct on-site audits and review the businesses' physical records. There are times when field auditors pick up records from a taxpayer's business and take them back to their home offices to work on their audit. However, field auditors have significant in-person contact with taxpayers and travel most days.

6. The official workstations of office-based auditors are Tax Department offices or facilities, as opposed to their homes. Office-based auditors have little, if any, in-person contact with taxpayers. Most of the time, office-based auditors review electronic records submitted by taxpayers and conduct audits in their offices. There are instances where office-based auditors may travel to a taxpayer's business to pick up records to work on in the office, but these trips are short and do not take much time. Any such travel time is done during the course of the regular workday and these auditors return to their offices afterward.

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[6] *See*, Grievant's Exhibit 7, "Tax and Revenue Auditor 3" classification specification.

7. Most of the office-based auditors work Monday through Friday from 8:00 a.m. until 4:00 p.m.

8. Given that field auditors' official workplaces are their homes, Respondent pays for their home internet service. Respondent does not pay for office-based auditors' home internet services.

9. Field auditors are also reimbursed for their mileage and receive per diem for meals when their travel meets the requirements to receive the same.

10. On or about August 30, 2018, Respondent issued its "WV State Tax Department Alternate Work Schedule and Flextime Policy." This policy became effective on September 1, 2018, and provides, in part, as follows:

> "[a]n AWS is a work schedule that falls outside the normal eight-hour work day traditionally used by the Tax Department and it intended to perpetuate for a period of more than 30 days. These schedules must be requested by employees a minimum of two pay periods in advance and approval is not guaranteed. The schedules must be requested on the AWS request form and submitted to the employee's supervisor. The supervisor has five business days to approve or deny the request and forward it to the division director. The division director then has five business days to approve or deny the request and forward the form to the Operations Division. Operations will approve or deny the request within five business days and notify all parties of the outcome of the request via email.
>
> Flextime is the idea that the completion of 40 hours of work, for a fulltime employee, is critical to the business of the Department. Flextime allows employees to make small modifications to their schedule on an ad hoc basis. This would not rise to the level of an AWS, and no modification to the planned schedule in KRONOS is required. Flextime would allow an employee to make up time in a given week to account

for being late, having a Dr. Appointment, or something similar. . . .[7]

11. Grievants applied for approval to work AWS in 2018 after this policy was issued, and they were granted the same. Thereafter, starting in October 2018, each Grievant began working four days per week, ten hours per day. Their schedules were 8:00 a.m. to 6:00 p.m. each day.

12. It is unknown if any other field auditors, who are not parties in this grievance, worked AWS.

13. Director Angell determined that sometime after the field auditors began working their new AWS hours, their productivity declined. She further determined that the decline in productivity coincided with the implementation of AWS. As such, Director Angell concluded that the field auditors' AWS schedules caused the decreased productivity and sought to have the field auditors taken off their AWS and returned to their original work schedules.

14. On September 23, 2019, Respondent informed the field auditors that effective September 30, 2019, they would no longer be allowed to work AWS. Grievants' work reschedules reverted to Monday through Friday from 8:30 a.m. to 4:30 p.m.

15. Office-based auditors and other Tax Department employees are allowed to request AWS and may be approved for the same based upon the Alternative Work Schedule and Flextime Policy.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden

[7]*See*, Joint Exhibit 1, "WV State Tax Department Alternate Work Schedule and Flextime Policy."

of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievants argue that Respondent's decision to remove their ability to work AWS pursuant to its Alternative Work Schedule and Flextime Policy was discriminatory, and that they should be allowed to return to working four days each week, ten hours per day. Respondent asserts that its decision to terminate Grievants' AWS and their ability to be considered for AWS, was proper as their production decreased, and it had the authority to do so.

Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Therefore, in order to establish a discrimination claim under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd*

Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

The West Virginia State Tax Department Alternative Work Schedule and Flextime Policy states, in part, as follows:

> Supervisors and division directors are expected to take operational needs, seasonal busy times, staffing levels, projects, and day to day operations of the unit into account prior to approving a request and moving it up the chain of command for approval. However, if no business reason for a denial is present, and all other requirements of this section are met, approval is expected to be granted. Supervisors and division directors denying a request must do so in writing to the Operations Division for review prior to notifying the employee. . .
>
> The Tax Department reserves the right to cancel an individual, full unit, or the entire agency's Alternate Work Schedule with one pay period's advance notice. . .
>
> There are several parameters that will dictate the approval or denial of a specific request. There are also certain times of year that are not conducive to AWS scheduling and each division will set the times of the year that an AWS can and cannot be used. . . .[8]

The first issue to address is whether the field auditors and the office-based officers are similarly situated. All auditors hold classifications of Tax and Revenue Auditor 1, 2, or 3, whether they are field auditors or office-based auditors. Pursuant to the classification specifications for the Tax and Revenue Auditor series, Tax and Revenue Auditor 1s, 2s, and 3s are required to have the same minimum requirements and perform the same type of auditing factions. The level of required supervision decreases with each step up in the series, and the higher-level auditors are given more responsibility with respect to training,

[8]*See*, Joint Exhibit 1, "WV State Tax Department Alternate Work Schedule and Flextime Policy."

teaching, and assisting other employees.[9] However, the evidence presented establishes that there are significant differences in what these employees do in their jobs and how they perform the functions of their positions. For example, the field auditors are stationed at their homes, are expected to travel almost daily, and they conduct on-site audits at the taxpayers' places of business. They are expected to have more in-person time with the taxpayers and examine business records on-site. Conversely, the office-based, or desk, auditors are expected to work in a Tax Department office each day, they do not travel as a regular part of their jobs, they review digital records submitted by taxpayers, and they have little to no facetime with the taxpayers. While they both conduct audits, field auditor positions and office-based auditor positions are configured differently and there are entirely different expectations and requirements for each. Given these significant differences, it would be possible to find that the two are not similarly situated.

However, the Grievance Board previously addressed the issue of whether field auditors and office-based auditors are similarly situated in the matter of *Hockensmith, et al., v. Tax Department*, Docket No. 2020-0661-CONS (Nov. 24, 2020). In that matter, travel pay, and not AWS, was at issue. The Grievance Board stated, in pertinent part, that,

> Grievants [Tax and Revenue Auditor 3s] are similarly situated to the office-based Tax & Revenue Auditors. Both groups are in the same classification, must have the same training, and perform the same auditing functions. In effect, their jobs are the same in virtually all respects except in how the audits are performed. Field-based Tax & Revenue Auditors are based in their home offices. They routinely travel to the client's location to perform their audit functions. Their duties are very travel intensive. In recognition of the travel requirements,

[9]*See*, Grievant's Exhibits 5, 6, and 7, Classification Specifications, Tax and Revenue Auditor 1, 2, and 3, respectively.

> Respondent provides the field-based auditor[s] with mileage reimbursement, per diem meal payments and over-night accommodations for trips which are more than 50 miles one-way.
>
> Office-based auditors do most of their work by electronically downloading business and financial records from clients and doing the audit work on their computers in their offices. These employees rarely travel in the performance of their work. When they do, it is generally for very short distances which do not take much time. The travel begins and ends after the auditors report to work and before they leave for home. In recognition of the way these employees perform their duties, Respondent counts any travel they perform as part of their workday and does not provide mileage reimbursement or meal expenses.
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> Undoubtedly, these employees are generally similarly situated, and they were treated differently regarding travel. However, this difference is related to the actual job responsibilities of each group. These responsibilities of the field-based auditors are integrally intertwined with the necessity for extensive travel. Conversely, the office-based auditors rarely travel to do their jobs. Because of this significant difference in how the two groups perform their duties, any difference in their treatment regarding travel is based upon their basic job responsibilities.

Id.

In the instant grievance, Grievants are required to go to taxpayer businesses to examine the physical financial records and to conduct audits onsite. This requires Grievants to be at the taxpayer locations during their operating hours. Grievants are expected to have more in-person contact with the taxpayers than office-based auditors. While on AWS, Grievants were working only four days per week, ten hours per day, from 8:00 a.m. to 6:00 p.m., including travel time. Deducting travel time of thirty minutes each way, that would put Grievants at the taxpayer businesses from 8:30 a.m. until 5:30 p.m., four days per week. When AWS was removed, Grievants were returned to working 8:30

a.m. to 4:30 p.m., including travel time, Monday through Friday. Deducting travel time, that would put the field auditors at the taxpayer businesses from 9:00 a.m. to 4:00 p.m., five days per week. Removing AWS from the field auditors possibly decreased the amount of hours they would be able to be present at the taxpayer locations each day, depending on the businesses' operating hours, but it opened up an additional day of the week on which they could be onsite to conduct audits. Field auditors are required to work within a taxpayer's operating hours. Having the extra day each week would increase the chances of finding mutually acceptable dates on which to schedule the audits. Also, a field auditor being available five days per week instead of four, would be more in line with accepted, standard operating hours for businesses. As in *Hockensmith, et al.,* given the unique requirements and expectations of the field auditors' jobs, any difference in treatment of the field auditors and the office-based auditors with respect to their work schedules, or AWS, is based upon their job responsibilities. Accordingly, the Grievants failed to prove their claim of discrimination by a preponderance of the evidence.

Further, the Alternative Work Schedule and Flextime Policy makes clear that the granting of AWS is discretionary, and that Respondent had the authority to discontinue Grievants' AWS. The policy also states that supervisors are to take into consideration the operational needs, seasonal busy times, staffing levels, projects, and day to day operations of the unit into account when making decisions about AWS. Director Angell testified that a decrease in the auditors' production was the reason for terminating AWS, and there is evidence that production was down in June 2019.[10] Production is certainly an operational need that should be considered in decision making. Grievants worked

[10]*See*, Grievants' Exhibit 12, June 2019, Unit Meeting Agenda.

their AWS for about a year before Respondent terminated it. This was not a situation where Respondent terminated Grievants' AWS without giving it a reasonable chance to be successful. While Grievants' disagree about the production level, given the evidence presented, the policy itself, and the differences in the job requirements of the field auditors and the office-based auditors, this ALJ cannot find that the termination of Grievant's AWS was unreasonable, or arbitrary and capricious. For the reasons set forth herein, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of

opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

3. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

4. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

5. Grievants failed to prove by a preponderance of the evidence their claim of discrimination.

6. Grievants failed to prove that Respondent's decision to terminate their alternative work schedules was arbitrary and capricious, or otherwise improper.

Accordingly, this Grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

DATE: September 29, 2021.

Carrie H. LeFevre
Administrative Law Judge